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BELLSOUTH

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January 30, 2006

The Honorable Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: *Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements*; Docket No. 19341-U
Docket No. 2004-316-C

Dear Mr. Terenni:

Please accept this letter in response to the letters CompSouth filed in this docket on December 14, 2005 (addressing a decision of a federal district court in Maine) and on January 24, 2006 (addressing a decision of the Georgia Public Service Commission).

Maine Court Decision

The Maine Court Decision addressed by CompSouth is not a final decision on the merits, and it is not binding upon this Commission. Instead, it is a decision disposing of a preliminary injunction motion in a docket that remains open and is certain to result in further activity. Also, the case is factually distinguishable because it all relates back to Verizon's wholesale tariff and the Maine Commission's perception that Verizon made a voluntary commitment to file 271 obligations in its wholesale tariff. The district court expressly found that Section 271 "was not intended by the Congress to exclude the PUC ***in the circumstances of this case*** from all activity in setting rates under §271." Maine Decision, p. 16 (emphasis supplied).

Additionally, the Maine Decision is based on faulty reasoning with respect to the relationship between the states and the FCC pursuant to Section 271. Section 271 is not a ratemaking provision; rather, it involves applications for certain authority under federal law. Section 271 does not have to include the word "preemption;" state commissions have limited authority under Section 252 to ensure Section 251 compliance. Because Section 271 is part of federal law, there is no baseline state authority to preempt -- states only have the authority to implement federal law that Congress gave them, and *USTA II* has made quite clear the limits on further FCC delegation to the states. Moreover, with respect to Section 271, Congress gave the relevant authority to the FCC and elsewhere expressly limited state authority to section 251 rates.

As to whether Section 271 requires TELRIC, the FCC itself explained that the just and reasonable requirement does not mandate TELRIC in the *TRO*, and that ruling was affirmed in *USTA II*. The Maine district court's attempt to minimize that is unpersuasive. The FCC's decision not to mandate unbundling under 251 for certain UNEs becomes meaningless if states can require the very same unbundling at the very same rates under 271. The result is no different than adding UNEs where the FCC has refused to require unbundling.

Moreover, and importantly, the Maine case is inconsistent with the two federal district court cases in Mississippi and Kentucky, both of which correctly acknowledged that Section 271 explicitly places enforcement authority with the FCC. It is also inconsistent with a third federal district court decision in Montana, which held that Section 252 did not authorize a state commission to approve an agreement containing elements or services that are not mandated by Section 251. BellSouth cited to these three federal court decisions in its Post-Hearing Brief.

BellSouth reiterates its position that state commissions do not have jurisdiction over Section 271 elements. Since BellSouth filed its post-hearing brief, three additional state commissions have adopted this position bringing the total to sixteen. The three new decisions are by the state commissions in Ohio, the District of Columbia, and Indiana.[1]

On November 9, 2005, the Ohio Commission entered its arbitration order in Case No. 05-0887-TP-UNC. Addressing Section 271, that commission held "[a]lthough SBC's obligations under Section 271 are not necessarily relieved based on the FCC's §251 unbundling analysis, these obligations should be addressed in the context of carrier-to-carrier agreements, and not §252 interconnection agreements, inasmuch as the components will not be purchased as network elements."[2]

On December 15, 2005, the District of Columbia Public Service Commission held that there is no requirement that Section 271 network elements be addressed in interconnection agreements negotiated and arbitrated pursuant to section 252. Indeed, the District of Columbia Commission made clear that its authority "does not extend to requiring inclusion of Section 271 network elements in interconnection agreements."[3]

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[1] The decisions by these three Commissions are summarized below. Due to the volume of the orders cited, BellSouth has not attached copies of these orders to this letter. BellSouth, of course, would be happy to provide copies to the Commission (with copies to all parties of record) upon request.

[2] *Arbitration Order, In re: Establishment of Terms and Conditions of an Interconnection Agreement Amendment Pursuant to the Federal Communications Commission's Triennial Review Order and its Order on Remand,* Case No. 05-0887-TP-UNC.

[3] *Order,* December 15, 2005, *Petition of Verizon Washington D.C., Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996,* TAC 19, Order No. 13836, *2005 D.C. PUC LEXIS* 257.

Most recently, on January 11, 2006, the Indiana Utility Regulatory Commission issued a similar ruling. Notably, the Indiana Commission made clear "[w]e join the many courts and commissions that have already held that Section 271 obligations have no place in a Section 251/252 interconnection agreement and that state commissions have no jurisdiction to enforce or determine the requirements of Section 271." The Indiana Commission rejected the CLECs' request to assert authority to interpret and enforce any unbundling obligations under Section 271 explaining "the few contrary decisions cited by the CLECs overlook the lack of any delegation of authority to state commissions under Section 271 and improperly seek to extend the scope of state commission authority with no statutory basis for doing so."[4]

Georgia Public Service Commission Order

CompSouth correctly notes that the Georgia Commission recently entered an order addressing the Section 271 issues involved in this docket. The Georgia Commission's decision is contrary to the vast majority of other state commission decisions and federal court decisions that address the subject. As you will recall, earlier the Georgia Commission had entered an order regarding the "no new adds" issue that was contrary to the vast majority of other state commission decisions. That order was enjoined by a federal district court in Georgia (as similar orders entered by the Mississippi and Kentucky Commissions were enjoined by federal district courts in those states), and the injunction was affirmed by the Eleventh Circuit Court of Appeals. BellSouth believes that the Georgia Commission's decision on the Section 271 issues is as erroneous as its decision on the no new adds issue, and BellSouth has appealed that decision to the federal district court in Georgia. A copy of that appeal is attached to this letter.

I would appreciate your bringing this letter to the attention of the Commission as it deliberates the matters before it in this docket.

Sincerely,

Patrick Turner

Patrick W. Turner

PWT/sgm
Attachment
cc: All Parties of Record
617810

[4] *Order,* January 11, 2006, *In re: Indiana Utility Regulatory Commission's Investigation of Issues Related to the Implementation of the Federal Communications Commissions' Triennial Review Remand Order and the Remaining Portions of the Triennial Review Order,* Case No. 42857.

DUPLICATE

FILED IN CLERK'S OFFICE
JAN 24 2006
LUTHER D. THOMAS, Clerk
By: Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**

| | | |
|---|---|---|
| BELLSOUTH TELECOMMUNICATIONS, INC., | ) | |
| Plaintiff, | ) | |
| v. | ) | |
| The GEORGIA PUBLIC SERVICE COMMISSION; STAN WISE, in his official capacity as Chairman of the Georgia PSC; DAVID L. BURGESS, in his official capacity as Vice Chairman of the Georgia PSC; H. H. DOUG EVERETT, in his official capacity as Commissioner of the Georgia PSC; ROBERT B. BAKER, JR., in his official capacity as Commissioner of the Georgia PSC; and ANGELA E. SPEIR, in her official capacity as Commissioner of the Georgia PSC, | ) | Civil Action No. 1 06 CV 0162 |
| Defendants. | ) | |

**COMPLAINT**
**FOR DECLARATORY AND INJUNCTIVE RELIEF**

**Nature of the Action**

1. Plaintiff BellSouth Telecommunications, Inc. ("BellSouth") brings this action seeking declaratory and injunctive relief from a decision of the Georgia Public Service Commission ("PSC") that is contrary to, and preempted by, federal

law and that assumes jurisdiction over a federal-law issue over which Congress has granted the PSC no authority of any kind.

2. The Federal Communications Commission ("FCC") issued a decision last year restricting access by competitive local exchange carriers ("competitive LECs" or "CLECs") to piece-parts of the networks owned by incumbent local exchange carriers ("incumbent LECs" or "ILECs") such as BellSouth. These piece-parts are known as "unbundled network elements" or "UNEs."

3. More specifically, that FCC decision, the *Order on Remand*,[1] held that, as of March 11, 2005, competitive LECs can no longer make new requests for access to incumbent LEC switches (facilities that route and connect calls) as UNEs and, in more limited instances, also cannot request UNE access to other facilities known as "loops" and "transport."[2]

4. Despite that clear FCC holding, the PSC last year ordered BellSouth to continue allowing competitive LECs to order those facilities as UNEs (and thus subject to artificially low, regulated UNE rates) in Georgia indefinitely, for as long

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[1] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*Order on Remand*"), *petitions for review pending, Covad Communications Co., et al. v. FCC, et al.*, Nos. 05-1095, *et al.* (D.C. Cir.).

[2] Loops are the wire and fiber facilities strung on telephone poles or buried underground that connect individual customer locations to the network. Transport refers to cables that connect the BellSouth facilities that house switches.

as competitive LECs can drag out proceedings to amend their existing interconnection agreements with BellSouth. This Court preliminarily enjoined that order, and that injunction was upheld by the Eleventh Circuit. *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., LLC*, No. 1:05-CV-0674-CC, 2005 WL 807062 (N.D. Ga. Apr. 5, 2005) (Cooper, J.), *aff'd*, 425 F.3d 964 (11th Cir. 2005). In light of these decisions, the PSC has voted to vacate in pertinent part the order under review in that case (although it has not yet released an order doing so).

5. Despite these facts, the PSC has now issued a second order, in which it has yet again contravened federal law by asserting jurisdiction to require BellSouth to permit CLECs to access network elements. In an attempted end-run around this Court's injunction, the PSC has purported to impose unbundling requirements under a provision of federal law, 47 U.S.C. § 271, which it claims authorizes it both to require BellSouth to include access to network elements in interconnection agreements with CLECs and to set "just and reasonable rates" for that access.

6. The PSC's newest attempt to mandate access to network elements at regulated rates is just as unlawful as the agency's attempt to do so last year. Contrary to the PSC's conclusion, it has no authority whatsoever to implement Section 271, and its recent decision does not even purport to cite any subsection of

that provision granting such authority. On the contrary, the statute makes clear that only the FCC may enforce Section 271 and that state commissions such as the PSC are limited to a purely advisory role. *See* 47 U.S.C. § 271(d)(2)(B). The PSC's decision is thus directly contrary to federal law and to the decisions of the FCC, and it is unlawful and preempted. The PSC's order should be declared unlawful and its enforcement should be enjoined.

**Parties, Jurisdiction, and Venue**

7. Plaintiff BellSouth is a Georgia corporation with its principal place of business in Georgia. BellSouth provides local telephone service throughout much of the State of Georgia. BellSouth is an ILEC in parts of Georgia within the meaning of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

8. Defendant the Georgia Public Service Commission is an agency of the State of Georgia. The PSC is a "State commission" within the meaning of the 1996 Act.

9. Defendant Stan Wise is the Chairman of the PSC, and he is sued in his official capacity for declaratory and injunctive relief only.

10. Defendant David L. Burgess is the Vice Chairman of the PSC, and he is sued in his official capacity for declaratory and injunctive relief only.

11. Defendants H. Doug Everett, Robert B. Baker, Jr., and Angela E. Speir are Commissioners of the PSC, and they are sued in their official capacities for declaratory and injunctive relief only.

12. This Court has subject matter jurisdiction over the action under 28 U.S.C. § 1331. The Court also has subject matter jurisdiction over the action under the Supremacy Clause of the U.S. Constitution and 28 U.S.C. § 1343(a)(3). Should 47 U.S.C. § 252(e)(6) be construed as jurisdictional, this Court also has jurisdiction under that provision.

13. Venue is proper in this District under 28 U.S.C. § 1391. Venue is proper under Section 1391(b)(1) because the PSC resides in this District. Venue is proper under Section 1391(b)(2) because a substantial part of the events giving rise to this action occurred in this District, in which the PSC sits.

## REGULATORY BACKGROUND

14. Congress enacted the 1996 Act to transform the market for local telephone service to one characterized by facilities-based competition, *i.e.*, multiple competitors using their own facilities to provide service to consumers. *See, e.g., Order on Remand* ¶ 218 ("[T]he Commission [has] expressed a preference for facilities-based competition. This preference has been validated by the D.C. Circuit as the correct reading of the statute.").

15. ***Section 251.*** Section 251 of the 1996 Act imposes certain limited duties on incumbent LECs like BellSouth, in order to foster a transition to facilities-based competition. Among other things, an incumbent LEC has the duty to allow competing carriers access to UNEs, which, as noted above, are piece-parts of the network owned and operated by the incumbent LEC. *See* 47 U.S.C. §§ 153(29), 251(c)(3).

16. An incumbent LEC's duty to provide "unbundled" access to specific network elements under Section 251(c) is contingent on an FCC determination that the facility at issue should be subject to unbundling. Under Section 251(d)(2), the FCC is charged with deciding which elements of the incumbent LEC's network should be "unbundled" and thus made available for competing carriers to lease from the incumbent LEC. Under the 1996 Act, the FCC may only require unbundling if it concludes that competitive LECs would otherwise be "impaired" in their ability to provide the telecommunications services they would seek to offer. 47 U.S.C. § 251(d)(2).

17. ***FCC Orders.*** Each of the FCC's first three orders determining the scope of incumbent LECs' unbundling duties established what the Supreme Court has termed "blanket" unbundling. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999). That is, with very limited exceptions not relevant here, the FCC

required incumbent LECs to make available as UNEs – and thus at low regulated rates – *all* of the basic piece-parts of their local voice networks in all geographic locations. Incumbent LECs were required to allow competitive LECs to provide access to switching, loops, and transport to serve essentially all of their customers. *See, e.g., id.* at 389-91 (discussing and invalidating as contrary to the 1996 Act the FCC's first attempt to require access to all basic incumbent LEC network facilities as UNEs).

18. Because competitive LECs could obtain access to all the UNEs necessary to provide local service, many competitors sought to provide service using *only* those UNEs, and not relying on any of their own facilities. *See Order on Remand*, 20 FCC Rcd at 2654, ¶ 220 ("Some competitive LECs have openly admitted that they have no interest in deploying facilities.").

19. Each of the FCC's blanket unbundling orders was vacated by the federal courts as inconsistent with the limitations on unbundling created by the 1996 Act. *See Iowa Utils. Bd.*, 525 U.S. at 388-91; *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003); *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.) ("*USTA II*"), *cert denied*, 125 S. Ct. 313, 316, 345 (2004).

20. As the D.C. Circuit explained in 2004 when it vacated the last of these FCC unbundling decisions, the FCC's repeated adoption of blanket unbundling requirements demonstrated a "failure, after eight years, to develop lawful unbundling rules, and [an] apparent unwillingness to adhere to prior judicial rulings." *USTA II*, 359 F.3d at 595.

21. On February 4, 2005, the FCC issued its *Order on Remand* in response to the most recent D.C. Circuit decision striking down the FCC's overbroad unbundling rules.

22. The FCC's *Order on Remand* established that competitive LECs may no longer order UNE switching. Specifically, the FCC said: "Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching." *Order on Remand*, 20 FCC Rcd at 2537, ¶ 5. The accompanying FCC rule likewise states unconditionally that "[r]equesting carriers *may not obtain* new local switching as an unbundled network element." 47 C.F.R. § 51.319(d)(2)(iii) (App. B to *Order on Remand*) (emphasis added); *see id.* § 51.319(d)(2)(i) ("An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis . . . .").

23. The FCC emphasized that its holdings in the *Order on Remand* would take effect on March 11, 2005. "Given the need for prompt action, the

requirements set forth here shall take effect on March 11, 2005, rather than 30 days after publication in the Federal Register." *Order on Remand*, 20 FCC Rcd at 2666, ¶ 235. The FCC found that "making the rules effective on March 11 will serve the public interest by preventing unnecessary disruption to the marketplace." *Id.* at 2666, ¶ 236.

24. The *Order on Remand* also created a transition period during which competitive LECs can continue to use unbundled switching, and thus the UNE Platform, only to serve their "embedded base" of *existing* customers. *Id.* at 2641, ¶ 199 (competitive LECs have a twelve-month period to "submit orders to convert their [UNE Platform] customers to alternative arrangements"). The FCC reasoned that "the twelve-month period" from March 11, 2005, to March 11, 2006, "provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or other conversion." *Id.* at 2660, ¶ 227.

25. Although the FCC provided much more limited relief from unbundling for loops and transport, *see id.* at 2575-76, ¶ 66, at 2614, ¶ 146, there too it adopted transition plans that allow continued use of the relevant facilities as UNEs only though March 11, 2006. *See id.* at 2612, ¶ 142, at 2639, ¶ 195.

26. ***Section 271.*** In addition to facilitating facilities-based competition in the local exchange, the 1996 Act also established a process under which the largest ILECs, known as Bell operating companies ("BOCs"), could obtain authority on a state-by-state basis to provide long-distance service. *See* 47 U.S.C. § 271. BellSouth is a BOC subject to Section 271.

27. Section 271 authorizes the FCC to grant a BOC application to provide long-distance in a given state, provided the BOC satisfies statutory criteria designed to confirm that the local market in the state is open to competition. *See AT&T Corp. v. FCC*, 220 F.3d 607, 612 (D.C. Cir. 2000). Those criteria include a showing that the BOC satisfies the "competitive checklist" – *i.e.*, a list of services and facilities that the BOC must make available to CLECs operating in the state. 47 U.S.C. § 271(c)(2)(B). That list includes "[l]ocal switching," "local loop transmission from the central office to the customer's premises," and "local transport from the trunk side of a wireline local exchange carrier switch." *See id.* § 271(c)(2)(B)(iv)-(vi).

28. CLECs contend that the local switching from the Section 271 competitive checklist is the same as the switching element that the FCC held in the *Order on Remand* does not have to be made available under Section 251.

29. The FCC has held that the obligations of the Section 271 competitive checklist continue even after a BOC obtains long-distance authority in a given state (as BellSouth has done in Georgia), and even after the FCC determines that the element need not be made available under Section 251. *See Triennial Review Order*,[3] 18 FCC Rcd at 17384-86, ¶¶ 653-655; *id.* at 17389-90, ¶ 665.

30. Importantly, however, where the FCC has determined that an element required under Section 271 is not required to be unbundled under Section 251, the rate that applies to that element is not the low TELRIC-based rate that applies to Section 251 unbundled elements. *See id.* at 17386-87, ¶¶ 657-659. Rather, in that circumstance, the pricing of the Section 271 element is subject to the "just, reasonable, and nondiscriminatory rate standard of sections 201 and 202" of the 1996 Act. *Id.* at 17389, ¶ 663; *see also UNE Remand Order*,[4] 15 FCC Rcd at 3906, ¶ 473. The FCC has held that, under Sections 201 and 202, "the *market price* should prevail" – "as opposed to a regulated rate." *Id.* (emphasis added). Thus, a

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[3] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*") (subsequent history omitted).

[4] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*") (subsequent history omitted).

BOC may satisfy Sections 201 and 202 simply by, among other things, "demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers [any] comparable functions" under its federal tariffs, or "by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate." *Triennial Review Order*, 18 FCC Rcd at 17389, ¶ 664.

31. In any event, however, a BOC chooses to demonstrate that the rate for a Section 271 element is "just and reasonable" under sections 201 and 202, any questions regarding the adequacy of the rate are to be resolved by the FCC, not a state commission. Congress granted "sole authority to the [FCC] to administer . . . section 271." *InterLATA Boundary Order*,[5] 14 FCC Rcd at 14400-01, ¶¶ 17-18 (emphasis added); *see* 47 U.S.C. § 271(d)(3), (6). By contrast, Congress gave the states only an advisory role in the Section 271 application process. *See id.* § 271(d)(2)(B). No provision of Section 271 (or, more generally, of federal law) purports to give a state commission like the PSC authority to implement Section 271. Such a grant of authority simply does not exist.

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[5] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding U S West Petitions To Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392 (1999) ("*InterLATA Boundary Order*").

## The PSC Proceedings

32. ***First PSC Order.*** In accordance with the FCC's *Order on Remand*, BellSouth notified competitive LECs on February 11, 2005, that, as of March 11, 2005, it would no longer accept new UNE switching orders or orders for loops and transport in circumstances where UNE access to those facilities is not required under the FCC's decision.

33. MCImetro Access Transmission Services, LLC ("MCI") responded to BellSouth's notice by filing an "Emergency Motion" with the PSC. That motion claimed that BellSouth's adherence to the FCC's statement that competitive LECs would not be "permit[ted]" to obtain switching as a UNE, *Order on Remand*, 20 FCC Rcd at 2641, ¶ 199, after March 11, 2005, would violate MCI's existing interconnection agreement with BellSouth. MCI claimed that BellSouth must instead follow the "change of law" process under that agreement and continue not only serving MCI's "embedded base," but also provisioning *new* UNE Platform orders as long as that change of law process was ongoing. Other competitive LECs soon followed with similar motions at the PSC as to both switching/UNE Platform and loops and transport.

34. On March 9, 2005, the PSC issued an order granting MCI's motion and requiring BellSouth to abide by the change of law provisions in its interconnection

agreements. *See* Order on MCI's Motion for Emergency Relief Concerning UNE-P Orders, *In re Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements*, Docket No. 19341-U, at 3-7 (Ga. Pub. Serv. Comm'n Mar. 9, 2005) ("*First PSC Order*"), *available at* http://www.psc.state.ga.us/19341/80721.pdf. Although the PSC conceded that the FCC has the authority to modify the terms of interconnection agreements, it concluded that the *Order on Remand* had not done so. The PSC also pointed to language in the FCC order stating that carriers "'must implement changes to their interconnection agreements consistent with our conclusions in this Order,'" *id.* at 4 (quoting *Order on Remand*, 20 FCC Rcd at 2665, ¶ 233), and argued that, because the FCC did not exclude issues relating to "new customers" from this paragraph, it applied to them as well, *see id.* at 5.

35. On March 11, 2005, BellSouth filed a complaint in this Court seeking declaratory and injunctive relief from the *First PSC Order*.

36. On April 5, 2005, this Court entered a preliminary injunction, which was upheld by the Eleventh Circuit, restraining the PSC and the CLEC defendants from seeking to enforce the *First PSC Order* by requiring BellSouth to process orders inconsistent with the *Order on Remand*. *BellSouth Telecomm., Inc. v. MCImetro Access Transmission Servs., LLC*, No. 1:05-CV-0674-CC, 2005 WL

807062 (N.D. Ga. Apr. 5, 2005), *aff'd*, 425 F.3d 964 (11th Cir. 2005). The Eleventh Circuit explained that "the CLECs are clinging to the former regulatory regime in an attempt to cram in as many new customers as possible before they are forced to bow to the inevitable, but their argument contravenes the clear intent of the [*Order on Remand*]." 425 F.3d at 970. In light of the clear decisions from this Court and the Eleventh Circuit, the PSC has voted to vacate the portions of the *First PSC Order* at issue in that case.

37. ***Second PSC Order.*** The PSC, however, has not stopped in its attempt to impose unbundling requirements in circumstances where it has no authority to do so. On January 17, 2006, the PSC issued a new order, *again* asserting authority to require BellSouth to include in its interconnection agreements access to UNEs, even in circumstances where access to those facilities as UNEs is not required under the FCC's *Order on Remand*. *See* Order Initiating Hearings to Set a Just and Reasonable Rate Under Section 271, *In re: Generic Proceeding to Examine Issues Related to BellSouth Telecommunications, Inc's. Obligations to Provide Unbundled Network Elements*, Docket No. 19341-U, at 1, 3 (Ga. Pub. Serv. Comm'n Jan. 17, 2006) ("*Second PSC Order*") (attached hereto as Ex. A). Additionally, the PSC claimed jurisdiction to set a "just and reasonable" rate for that mandated UNE access. *See id.* at 3-4.

38. Thus, despite this Court's injunction against the PSC's last attempt to assert authority to impose unbundling, it has again sought to mandate access to network elements at regulated rates. This time, the PSC has identified Section 271 as the source of its authority for requiring BellSouth to provide access to UNEs at regulated rates, concluding "that it is reasonable to assert jurisdiction to set just and reasonable rates for de-listed UNEs pursuant to Section 271 of the Federal Telecom Act." *Id.* at 4. Although the PSC acknowledged that the FCC – and not it – was the only agency that Congress authorized to enforce Section 271, it claimed that, by setting just and reasonable rates for UNE access, it was "not enforcing Section 271." *Id.* at 3. Nevertheless, the PSC could point to no part of Section 271 (or any other provision of federal law) granting it authority to implement Section 271, regardless of whether that implementation is understood as "enforcement." The PSC can have authority to implement Section 271 only if a provision of federal law grants such authority, which is why the PSC's suggestion that it is not "pre-empted" here, *id.* at 4 (internal quotation marks omitted), is illogical and legally incorrect. As the Eighth Circuit has explained, "[t]he new regime [under the 1996 Act] for regulating competition is federal in nature . . . and while Congress has chosen to retain a significant role for the state commissions, *the scope of that role is measured by federal, not state, law.*" *Southwestern Bell Tel.*

*Co. v. Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000) (emphasis added).

39. The PSC, moreover, apparently intends to set rates for purposes of Section 271 that are purportedly binding on BellSouth. It intends to "proceed with an expedited hearing schedule . . . for the purpose of setting just and reasonable rates for de-listed UNEs pursuant to Section 271." *Second PSC Order* at 4.

40. In determining that it had the authority to set rates, the PSC did not acknowledge, much less address, the fact that the only provision of federal law that authorizes state commissions to set rates under the 1996 Act expressly limits such ratesetting authority to determining rates for "purposes of" Section 251, *not* 271. 47 U.S.C. 252(d). Thus, even if the PSC had some authority under Section 271 (and it does not), Congress plainly has withheld from the PSC *ratesetting* authority for purposes of that section. Moreover, the PSC has not attempted to square its attempt to set regulated rates for purposes of Section 271 with the FCC's clear directive that "market rates" must prevail under that section. *UNE Remand Order*, 15 FCC Rcd at 3906, ¶ 473.

41. Should the PSC issue further orders setting specific rates, BellSouth intends to avail itself of all legal remedies, which may include amending this Complaint to challenge those further orders. Additionally, to the extent that the

PSC sets rates that are lower than BellSouth's market rates, which BellSouth has negotiated with more than 170 CLEC customers, BellSouth intends immediately to seek injunctive relief from this Court to prevent losses of customers and other forms of irreparable injury.

**Claim for Relief**

42. BellSouth incorporates paragraphs 1-41 as if set forth completely herein.

43. The PSC's decision is inconsistent with the 1996 Act and binding decisions of the FCC, and is thus contrary to federal law and preempted.

44. Section 271 is subject to the exclusive jurisdiction of the FCC, and the PSC accordingly has no jurisdiction to enforce its obligations or to set just and reasonable rates under it.

45. In any event, even if the PSC had jurisdiction to act under Section 271, its decision to set regulated rates contravenes the FCC's determination that the market governs rates for access to facilities under that section.

46. Because the PSC acted without jurisdiction and in a manner that is inconsistent with FCC decisions, the *Second PSC Order* is unlawful under the Supremacy Clause, 47 U.S.C. § 261, 47 U.S.C. § 252(e)(6), and 47 U.S.C. § 251(d)(3), among other statutory provisions.

## Prayer for Relief

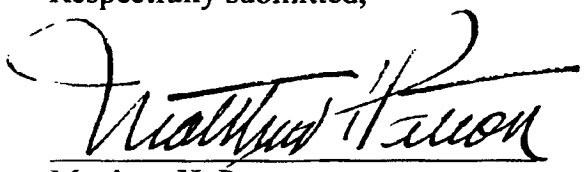
WHEREFORE, Plaintiff BellSouth prays that the Court enter an order:

1. Declaring that the *Second PSC Order* is unlawful and preempted by federal law;

2. Enjoining the PSC, and all parties acting in concert therewith, from seeking to enforce that unlawful decision against BellSouth; and

3. Granting BellSouth such further relief as the Court may deem just and reasonable.

Respectfully submitted,

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January 24, 2006

Exhibit A

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**Docket No. 19341-U**

**In Re: Generic Proceeding to Examine Issues Related to BellSouth Telecommunications, Inc's. Obligations to Provide Unbundled Network Elements**

## ORDER INITIATING HEARINGS TO SET A JUST AND REASONABLE RATE UNDER SECTION 271

## I. Background

The Georgia Public Service Commission ("Commission") initiated this docket on August 24, 2004. In its June 30, 2005 Procedural and Scheduling Order, the Commission directed the parties to submit a Joint Issues List. The Commission approved the Joint Issues List submitted by BellSouth Telecommunications, Inc. ("BellSouth") and Competitive Carriers of the South ("CompSouth")[1] along with the issues added by Digital Agent, LLC. (Order on Motion to Move Issues into Generic Proceeding, p. 2).

While the docket includes twenty-five (25) issues, the most significant issue, and one that impacts the resolution of several other issues in the docket, is set forth as part of Issue 8(a). Issue 8(a) states as follows:

> Does the Commission have the *authority* to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, or pursuant to Section 271 or any other federal law other than Section 251?

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[1] CompSouth is an association of Competitive Local Exchange Carriers.

At its January 17, 2006 Administrative Session, the Commission limited its consideration to only this issue. At a later time, the Commission will address the remaining issues.

## II. Positions of the Parties

### A. BellSouth

The foundation for BellSouth's position is that its obligations with respect to state commission approved interconnection agreements are tied exclusively to Section 251. It is from this premise that BellSouth argues that a state commission's authority does not extend to requiring an incumbent local exchange carrier ("ILEC") to comply with any terms and conditions based in any other section of federal law. BellSouth concludes that to the extent it has ongoing unbundling obligations under Section 271, then those obligations are to be enforced by the Federal Communications Commission ("FCC").

CompSouth's argument is based on a theory that Sections 251 and 271 are independent but interrelated. The first step in their analysis is pointing out that the Triennial Review Order established that the duties of an ILEC under Section 271 are independent from the obligations of a Bell operating company ("BOC") under Section 251. The import of this conclusion is that the omission of an obligation under Section 251 would not mean that the obligation ceases to exist under Section 271. The next step in the analysis focuses on the references to Section 252 interconnection agreements in Section 271. In short, CompSouth argues that because Section 252 interconnection agreements must include items from the Section 271 competitive checklist, state commissions have the authority to require ILECs to include in Section 252 interconnection agreements unbundling requirements under Section 271.

## III. FINDINGS AND CONCLUSIONS

The Commission has examined the arguments of both parties and recognizes that the question of its jurisdiction on this issue has not been yet been squarely addressed by a controlling authority. The Commission will proceed with its analysis in an effort to act properly under the law and to protect the consumers of the State of Georgia. Incumbent local exchange carriers have the obligation to negotiate in good faith interconnection agreements with requesting telecommunications carriers. 47 U.S.C. § 251(c)(1). Under Section 252, these interconnection agreements may be voluntarily negotiated. 47 U.S.C. § 252(a)(1). State commissions may be asked to mediate disagreements that arise between the parties during negotiations. 47 U.S.C.§ 252(a)(2). If the parties are unable to reach agreement through negotiation, then a party to the negotiation may petition the state commission for arbitration. In such an instance, the state commission resolves the issues set forth in the petition for arbitration and the response thereto. 47 U.S.C. § 252(b)(4)(C). Regardless of whether the interconnection agreement is reached through voluntary negotiation or compulsory arbitration, it must be approved by the state commission prior to becoming effective. 47 U.S.C. § 252(e)(1). A state commission is also authorized to reject an interconnection agreement. *Id.* Section 251(f) provides for the filing by a bell operating company of a Statement of Generally Available Terms ("SGAT"). In order to be approved by a state commission, such a filing must be found to comply with Section 251 and Section 252(d). 47 U.S.C. § 252(f)(2).

Section 271 compliance is necessary for a BOC to establish or maintain the right to provide interLATA long distance services. In order to comply with the requirements of Section 271, a BOC must provide access and interconnection pursuant to at least one Section 252 interconnection agreement or be offering access and interconnection pursuant to an SGAT. 47 U.S.C. § 271(c)(2)(A)(i). In addition, Section 271 requires that the BOC provide access to unbundled network elements ("UNEs") on the competitive checklist set forth within the statute at just and reasonable rates. 47 U.S.C. § 271(c)(2)(B)(i). The Section 271 competitive checklist items (i) and (ii) make explicit reference to compliance with provisions in Sections 251 and 252. Therefore, the Section 252 agreements are the vehicles through which a BOC demonstrates compliance with Section 271. As such, it is logical to conclude that obligations under Section 271 must be included in a Section 252 interconnection agreement. This conclusion is consistent with the holding of the Minnesota District Court in *Qwest Corporation v. Minnesota Public Utilities Commission,* 2004 U.S. Dist. LEXIS 16963 (D. Minn. 2004). The District Court found that any agreement containing a checklist term must be filed as an ICA under the Act. *Qwest Corporation.* As stated above, state commissions have authority to approve or reject these interconnection agreements.

There are elements that a BOC must provide under Section 271 that the FCC has found no longer meet the Section 251 impairment standard. While a BOC is no longer obligated to offer such an element at TELRIC[2] prices, the element still must be priced at the just and reasonable standard set forth in Section 271. (*Triennial Review Order,* ¶ 663). In discussing the just and reasonable standard the FCC states as follows:

> Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied *under most federal and state statutes,* including (for interstate services) the Communications Act.

*Id.* (emphasis added). Far from claiming the exclusive right to set the rates pursuant to this standard, the FCC expressly recognizes the application of such a standard at both the state and the federal level.

BellSouth's preemption argument overstates what the Commission is being asked to do in this proceeding. By setting rates, the Commission is not enforcing Section 271. The FCC's enforcement authority under Section 271 is clear. Section 271(d)(6) sets forth the actions that the FCC may take if it determines that a BOC has ceased to meet any of the conditions required for approval. The actions that the FCC may take if it finds such non-compliance include the issuance of an order obligating the BOC to correct the deficiency, the imposition of a penalty or the suspension or revocation of such approval. 47 U.S.C. 271(d)(6)(A)(i), (ii) and (iii). First, the Commission is not making a finding that BellSouth has failed to meet any of the conditions for Section 271 approval. Rather, it is setting just and reasonable rates for de-listed unbundled network elements. Second, the Commission is not taking any of the actions included in Section 271(d)(6). The setting of just and reasonable rates does not assume any of the responsibilities that the Federal Act reserves for the FCC under Section 271(d)(6).

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[2] "TELRIC" is an acronym for total element long-run incremental cost.

Recently, the United States District Court for the District of Maine considered the question of whether the FCC has exclusive jurisdiction to establish, interpret, price, and enforce network access obligations under Section 271. The District Court concluded that the Federal Act did not intend to preempt state regulation of Section 271 obligations. *Verizon New England Inc. d/b/a Verizon Maine v. Maine Public Utilities Commission,* 2005 U.S. Dist. LEXIS 30288 at 16. The Court reasons that while it is the FCC that approves Section 271 applications, there is no provision in the federal act that grants the FCC exclusive ratemaking authority for Section 271 UNEs. *Id.* The Court further reasons that Section 271 only impliedly contemplates the making of rates, and it concludes that "the authority of state commissions over rate-making and its applicable standards is not pre-empted by the express or implied content of Section 271." *Id.* at 17. Finally, the Court notes that Verizon did not cite to any FCC order that interpreted Section 271 to provide an exclusive grant of authority for rate-making under Section 271. *Id.*

The Commission finds similarly that BellSouth has not cited to any federal court decision directly on point. BellSouth cites to a decision of United States District Court for the Southern District of Mississippi[3] for the proposition that the FCC enforces Section 271. (BellSouth Brief, p. 20). Similarly, BellSouth cites to a decision for the United States District Court for the Eastern District of Kentucky[4] that also focuses on the issue of FCC enforcement authority for Section 271. *Id.* As discussed above, the question of enforcement of the statute is a separate issue from the question of setting just and reasonable rates.

Based on the foregoing, the Commission concludes that it is reasonable to assert jurisdiction to set just and reasonable rates for de-listed UNEs pursuant to Section 271 of the Federal Telecom Act. Pursuant to this jurisdiction, the Commission will proceed with an expedited hearing schedule as detailed below for the purpose of setting just and reasonable rates for de-listed UNEs pursuant to Section 271. The Commission will continue to monitor proceedings to determine whether any case law or FCC decision sheds additional light on the jurisdictional question under Section 271. In the absence of any additional guidance, the Commission will file an emergency petition with the FCC seeking that it clarify that state commissions have the authority to set just and reasonable rates for de-listed UNEs. Along with the petition, the Commission will certify the record from the evidentiary proceeding to be held in February in this docket. In the event that the FCC concludes that this Commission does not have jurisdiction to set Section 271 rates, then the expedited petition will ask the FCC to set rates for the de-listed UNEs based on the record that this Commission will have compiled and certified in the petition.

## IV. HEARING DATES AND PROCEDURES

### February 10, 2006

BellSouth and other interested parties may file cost studies and Direct Testimony regarding issues in this docket. Accompanied therewith shall be an electronic version of the

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[3] *BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Com'n. et al.,* Civil Action No. 3:05 CV173LN, *Memorandum Opinion and Order* (S.D. Miss. Apr. 13, 2005), 2005 U.S. Dist. LEXIS 8498.

[4] *BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al.,* Civil Action No. 3:05-CV-16-JMH, *Memorandum Opinion and Order,* (E.D. Ky. Apr. 22, 2005).

party's testimony, which shall be made on a 3.5" diskette using Microsoft Word® format for text documents and Excel® for spread sheets or other comparable electronic format. Under no circumstances should an electronic filing consist of more than four (4) files, including attachments. Cost studies may be filed on CD Rom. This filing shall be made at the office of the Executive Secretary, Georgia Public Service Commission, 244 Washington Street, S.W., Atlanta, Georgia 30334-5701. If a party chooses to use the BSTLM cost model to develop proposed rates, that party shall include in its testimony detailed descriptions of each and every change made within the model.

**February 20-23, 2006**

At 10:00 a.m., the Commission will commence hearings for Docket No. 19341-U beginning with the testimony of any public witnesses pursuant to O.C.G.A. § 46-2-59(g), and the hearing of any appropriate motions. After these preliminary matters, the Commission will conduct hearings on the testimony filed by BellSouth and the intervenors. Hearings will commence at 10:00 a.m. each day for the duration of the hearings, except that on February 21, hearings will commence at 1:30 p.m. The hearings will take place in the Commission Hearing Room on the First Floor of 244 Washington Street, S.W., Atlanta, Georgia 30334-5701.

**February 28, 2006**

All parties are to file an original and fifteen (15) copies of closing briefs, orders or recommendations. Accompanied therewith shall be an electronic version of a party's filing, which shall be made on a 3½ inch diskette using Microsoft Word® format for text documents and Excel® for spread sheets.

**Discovery**

The Commission finds and concludes that it is appropriate to permit the parties to conduct discovery in this proceeding, subject to the following procedures. The parties shall have the right to issue written discovery and conduct depositions. Written discovery, for parties other than the Staff, shall be limited to 25 requests. Objections to discovery shall be filed within ten (10) days after receipt of discovery. Responses to discovery shall be provided no later than fourteen (14) days after receipt of the request. Depositions shall be limited to one per witness. Parties should endeavor to keep their discovery requests focused on the issues in this docket, and to use written data requests in the first instance to obtain the data, information, or admissions they may seek. Discovery requests shall be served electronically, and all discovery requests must be served prior to January 24.

## Copies of Pleadings, Filings and Correspondence

Parties shall file the original plus 15 copies, as well as an electronic version (Word format for text documents), of all documents with the Commission's Executive Secretary no later than 4:00 p.m. on the date due. However, only two copies need to be filed for discovery responses. In addition, copies of all pleadings, filing, correspondence, and any other documents related to, and submitted in the course of this docketed matter (except for discovery requests and responses) shall be served upon the other parties as well as upon the following individuals in their capacities as indicated below:

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## Record

The parties shall be responsible for bringing before the Commission all evidence that they wish to have considered in this proceeding. The Commission may also require the parties to provide any additional information that the Commission considers useful and necessary in order to reach a decision. Any party filing documents or presenting evidence that is considered by the source of the information to be a "trade secret" under Georgia law, O.C.G.A. § 10-1-761(4), must comply with the rules of the Commission governing such information. *See* GPSC Rule 515-3-1-.11 Trade Secrets (containing rules for asserting trade secret status, filing both under seal and with public disclosure versions, use of protective agreements, petitioning for access, and procedures for challenging trade secret designations). Responses to discovery will not be considered part of the record unless formally introduced and admitted as exhibits.

**Testimony of Witnesses**

(a) Summations of direct testimony will take no longer than ten (15) minutes, unless the Commission, in its discretion, allows for a longer period of time.

(b) In the absence of a valid objection being made and sustained, the pre-filed testimony and exhibits, with corrections, will be admitted into the record as if given orally prior to the summation made by witnesses subject to a motion to strike after admission or other relevant objection.

(c) Where the testimony of a panel of witnesses is presented, cross-examination may be addressed either to the panel, in which case any member of the panel may respond, or to any individual panel member, in which case that panel member shall respond to the question.

## *Rights of the Parties*

The parties have the following rights in connection with this hearing:

(1) To respond to the matters asserted in this document and to present evidence on any relevant issue;

(2) To be represented by counsel at its expense;

(3) To subpoena witnesses and documentary evidence through the Commission by filing requests with the Executive Secretary of the Commission; and

(4) Such other rights as are conferred by law and the rules and regulations of the Commission.

**WHEREFORE, it is**

**ORDERED,** that the Commission hereby adopts the procedures, schedule, and statements regarding the issues set forth within this Order.

**ORDERED FURTHER**, that the Commission hereby asserts its authority under Section 271 of the Federal Act to set just and reasonable rates for de-listed unbundled network elements.

**ORDERED FURTHER,** that at the conclusion of the proceedings the Commission will file with the FCC an expedited petition as described herein.

**ORDERED FURTHER,** that a motion for reconsideration, rehearing or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

**ORDERED FURTHER,** jurisdiction over this matter is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 17th day of January 2006.

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|---|---|
| **REECE MCALISTER** | **STAN WISE** |
| **EXECUTIVE SECRETARY** | **CHAIRMAN** |
| **Date** | **Date** |

STATE OF SOUTH CAROLINA )
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND )

The undersigned, Jeanette B. Mattison, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. ("BellSouth") and that she has caused BellSouth's letter in response to the letters CompSouth filed on December 14, 2005 and January 24, 2006 in Docket No. 2004-316-C to be served upon the following this January 30, 2006.

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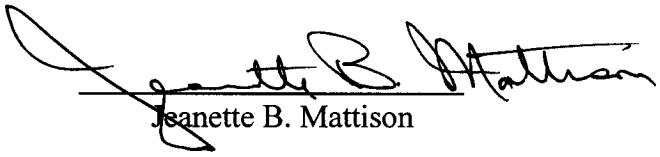

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